

# Catholic University Law Review

---

Volume 52  
Issue 4 *Summer 2003*

Article 10

---

2003

## Taking Stock in Public Trust Doctrine: Can States Provide for Public Beach Access without Running Afoul of Regulatory Takings Jurisprudence?

Sean T. Morris

Follow this and additional works at: <https://scholarship.law.edu/lawreview>

---

### Recommended Citation

Sean T. Morris, *Taking Stock in Public Trust Doctrine: Can States Provide for Public Beach Access without Running Afoul of Regulatory Takings Jurisprudence?*, 52 Cath. U. L. Rev. 1015 (2003).

Available at: <https://scholarship.law.edu/lawreview/vol52/iss4/10>

This Comments is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact [edinger@law.edu](mailto:edinger@law.edu).

# TAKING STOCK IN THE PUBLIC TRUST DOCTRINE: CAN STATES PROVIDE FOR PUBLIC BEACH ACCESS WITHOUT RUNNING AFOUL OF REGULATORY TAKINGS JURISPRUDENCE?

Sean T. Morris<sup>\*</sup>

## I. WAR FOR THE SHORE

There are battles brewing along our nation's shorelines.<sup>1</sup> In America today, more than half of the population lives within fifty miles of the coast and seventy percent of the property abutting that coastline is privately owned.<sup>2</sup> In California, the nation's most populous state, an estimated eighty percent of its more than thirty-four million citizens live within an hour's drive of the ocean.<sup>3</sup> The combination of a growing population and the increased privatization of beachfront property has generated a great deal of conflict over beach access.<sup>4</sup>

The conflict pits the public and its right to enjoy the beach against the private property rights of coastal property owners.<sup>5</sup> In southern California, with its legendary lifestyle of sun and surf, the battle over the shoreline is particularly fierce.<sup>6</sup> Malibu, for example, can be thought of

---

<sup>\*</sup> J.D. Candidate, May 2004, The Catholic University of America, Columbus School of Law.

1. See Bill Schneider, *Coastline Access: The Battle Over Beachfront Ownership*, at <http://www.cnn.com/2002/ALLPOLITICS/08/09/ip.pol.beach> (Aug. 9, 2002).

2. *Id.*

3. Martin Kasindorf, *Malibu's Rich and Famous Fight to Keep Beach Private*, USA TODAY, May 3, 2002, at A1; see also John Krist, *Lawmakers Act to Preserve Coastal Access*, ENVTL. NEWS NETWORK, at [http://www.enr.com/news/enr-stories/2002/10/10042002/s\\_48590.asp](http://www.enr.com/news/enr-stories/2002/10/10042002/s_48590.asp) (Oct. 4 2002) (citing a 1997 report by the Public Research Institute of San Francisco State University that reported, "California residents account for 481 million annual visitor days at the coast, and the average family makes 15 beach trips a year").

4. James M. Kehoe, Note, *The Next Wave in Public Beach Access: Removal of States as Trustees of Public Trust Properties*, 63 FORDHAM L. REV. 1913, 1915 (1995); see also Timothy Egan, *Owners of Malibu Mansions Cry, This Sand is My Sand*, N.Y. TIMES, Aug. 25, 2002, at A1 (quoting Robert Ritchie, Director of Research, Huntington Library, San Marino, Cal.) ("[B]ecause a very significant percentage of the United States population now lives in counties facing the ocean, the pressure for public access has become enormous. At the same time, you have these homeowners fighting to keep the hordes back.").

5. Kehoe, *supra* note 4, at 1913-14.

6. Egan, *supra* note 4, at A1. One property owner in Santa Barbara County, California, has already paid \$460,000 in fines during her fight to block access to the 500-foot strip of beach that lies below her 25-acre estate. *Id.* The case, along with a similar

as the western front in the war over beach access. There, wealthy property owners have been trying, via lawsuits and court orders, to keep the public-at-large from accessing the beaches in front of their multi-million dollar estates.<sup>7</sup>

Many of the battles in southern California involve easements that were required by the State as a condition for building along the coastline in the 1980s.<sup>8</sup> The State rarely sought to enforce them until quite recently.<sup>9</sup> In an effort to provide for greater access to the shore, the California Coastal Commission has begun enforcing these easements and is hoping to use them to cut a path to the beach every thousand feet along the shore.<sup>10</sup> In response, some affected property owners have taken the Coastal Commission to court.<sup>11</sup> Their argument is that providing for public beach access via their private property amounts to a taking without just

---

one, was denied a hearing by the Supreme Court in October of 2002. *Daniel v. Santa Barbara County*, 537 U.S. 973 (2002) (denying petition for writ of certiorari). In response, the land owner issued a statement in which she said she was “disappointed” and that it was her hope that the “U.S. Supreme Court will come around as it did with civil rights and stop the California Coastal Commission from expropriating private property.” David G. Savage & Kenneth R. Weiss, *Justices Bolster Beach Access*, L.A. TIMES, Oct. 22, 2002, at A1.

7. See Kasindorf, *supra* note 3. In Malibu, California, the battle centers around a three-mile stretch of beach to which there is no public beach access due to a continuous line of residences. *Id.* One advocate of beach access easements frames the issue in this way: “These people can afford to have a \$5 million home for a second home, and they’re never there, and yet they still want it locked up . . . . It ain’t your backyard, buddy. It belongs to the people.” *Id.*

8. Ed Vulliamy, *Celebs vs Plebs in the Battle of Malibu Beach*, THE OBSERVER, May 19, 2002. The property owner seeking to build had to make an Offer to Dedicate (OTD). Krist, *supra* note 3. Before granting a coastal development permit, the California Coastal Commission “required that the private landowner offer an easement, generally 10-25 feet wide, to a government agency or nonprofit organization. Once a recipient accepts the offer—contingent on its acceptance of liability and responsibility for maintenance of the access route—it obtains title to the easement.” *Id.*

9. Kasindorf, *supra* note 3 (describing the public right of way options as “half-forgotten”); see also Krist, *supra* note 3 (noting that “[i]f no public or private entity accepts the [public right of way option], it generally expires after 21 years”).

10. Kasindorf, *supra* note 3; see also Brian Doherty, *Their Own Private Malibu*, WALL ST. J., July 16, 2002, at A16 (listing some of the “relevant area homeowners with as-yet-unopened easements on or near their property”).

11. Doherty, *supra* note 10. In January of 2002, Access for All, an organization dedicated to providing for public access to California’s beaches, adopted an easement that entertainment mogul David Geffen had dedicated in 1983 and which was set to expire in 2004. *Id.*; see also Egan, *supra* note 4. Geffen sued the California Coastal Commission and claimed that opening the easement violated his property and equal protection rights. Doherty, *supra* note 10; see also Egan, *supra* note 4 (noting that although Geffen promised to allow for access 19 years ago, he “now says it would be unsafe, dirty and impractical to allow people to walk by his home to the beach”).

compensation in violation of the Fifth Amendment to the United States Constitution.<sup>12</sup>

Similar battles are being fought on many other fronts.<sup>13</sup> From Maine to Miami, and Long Island Sound to Puget Sound, the fight taking place in Malibu is repeating itself throughout the country.<sup>14</sup> Most of these lawsuits concern the issue of beach access, and many involve the use of the Public Trust Doctrine.<sup>15</sup> The Public Trust Doctrine is an ancient concept providing that submerged lands and those lying seaward of the mean high tide mark are held by the state in trust for the public and, as such, are not subject to private ownership.<sup>16</sup> However, if private landowners can exclude the public from gaining access to the large

---

12. Egan, *supra* note 4; U.S. CONST. amend. V. The Fifth Amendment to the United States Constitution states that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” *Id.*

13. See Gail Diane Cox, *Coast to Coast to Court*, NAT’L L.J., Aug. 20, 2001, at A1 (outlining beach access lawsuits in Connecticut, New Jersey, North Carolina and California). One of the most prominent of these lawsuits was *Leydon v. Town of Greenwich*, 777 A.2d 552 (Conn. 2001). Greenwich, Connecticut is a wealthy suburb of New York City with a population of approximately 58,000. Geraldine Baum, *Falling Public Beach Access is Kicking Up a Sandstorm*, S. FLA. SUN-SENTINEL, May 19, 2002, at 13A. The town got in trouble in 1994 after officials stopped law student Brenden Leydon at the gate to Greenwich Point Park and denied him access to the park and its half-mile-long beach. *Id.* Leydon happened to be studying a case on the Public Trust Doctrine and decided to challenge Greenwich’s policy of denying beach access—he won. *Id.* Although Leydon was inspired to bring the case by the Public Trust Doctrine, the case was eventually decided by the Connecticut Supreme Court, not by relying on the Public Trust Doctrine as the lower appellate court had, but rather on First Amendment grounds. *Leydon*, 777 A.2d at 565. The court held that denying access to non-residents was a violation of the right to freedom of expression, as the beach and surrounding park was a “traditional public forum.” *Id.* at 568. Nevertheless, the end result was the same, and the beach was opened to non-residents. *Id.* at 579-80.

14. See Cox, *supra* note 13; see also David L. Greene, *Beach Prohibition in Deep Water: Court Tells Conn. Town to Open Park to Public*, BALT. SUN, June 4, 2000, at A1, available at 2000 WL 4870574 (describing the fight over beach access in Greenwich, Connecticut); Lisa Woods, *Private Beaches a Public Issue: Ownership, Access Areas Raise Debate*, FLA. TIMES-UNION, July 24, 2002 at L1, available at 2002 WL 5968133 (reporting on a similar conflict in Florida); Brian Feagans, *‘Serious Threat’: Suit Aims For Private Beaches*, MORNING STAR (Wilmington, N.C.), July 25, 1998, at 1A, available at 1998 WL 12698353 (discussing a lawsuit brought over beach access in North Carolina); Michael Serrill, *The Gritty Battle for Beach Access*, TIME, Aug. 27, 1984, at 48, available at 1984 WL 2059021 (reporting on Maine property owners building fences, towing cars, and throwing rocks in order to keep beachgoers off their land).

15. Cox, *supra* note 13.

16. See Gilbert L. Finnell, Jr., *Public Access to Coastal Public Property: Judicial Theories and the Taking Issue*, 67 N.C. L. REV. 627 (1989) (citing Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 473-74 (1988)). *Phillips Petroleum* and its discussion of the Public Trust Doctrine will be addressed later in this Note. See *infra* Part II.A.1.

number of the nation's beaches that lie adjacent to private property, these trust lands effectively become private property.<sup>17</sup>

Recently, property rights advocates have challenged some of the efforts of municipalities to provide for public beach access on the ground that such efforts amount to government takings.<sup>18</sup> This Note will examine the application of regulatory takings analysis to the Public Trust Doctrine. Specifically, it will argue that, by using the Public Trust Doctrine, states can overcome takings challenges by private property owners. This Note will show that access easements can be based on the legitimate state purpose of upholding the Public Trust Doctrine, which trumps any purported exclusionary rights of the affected property owners. Essentially, this Note will argue that the public's right of access to our nation's beaches predates any private property rights, and that it is the responsibility and duty of state governments, as trustees of these lands, to ensure future beach access.

## II. WHERE WE HAVE BEEN, WHERE WE ARE GOING: LEGAL BACKGROUND OF THE PUBLIC TRUST DOCTRINE AND REGULATORY TAKINGS

### A. *The Public Trust Doctrine*

#### 1. *Historical Development: 1500 Years in the Making*

The Public Trust Doctrine embodies legal concepts that date back to the sixth century A.D.<sup>19</sup> The Byzantine Emperor Justinian provided in his compendium of Roman law principles that “by the law of nature these things are common to mankind—the air, running water, the sea, and consequently the shores of the sea.”<sup>20</sup> By the law of Rome, the seashore was not subject to private ownership.<sup>21</sup>

---

17. See Kehoe, *supra* note 4, at 1913.

18. *Id.* at 1913-14 (noting the “diametrically opposed views” of beach access proponents who argue that the public should have the right of access to every beach regardless of whether the beachfront property is privately or publicly owned, and beachfront homeowners who believe that the public should only be allowed access to public beaches).

19. Vulliamy, *supra* note 8; see also Kehoe, *supra* note 4, at 1918 (noting that “[t]he Romans, in creating their laws, borrowed heavily from the Greeks, who were very dependent on the resources of the sea”).

20. Frank Langella, Note, *Public Access to New York and New Jersey Beaches: Has Either State Adequately Fulfilled Its Responsibilities as Trustee Under the Public Trust Doctrine?*, 44 N.Y. L. SCH. L. REV. 179, 182 (2000) (quoting THE INSTITUTES OF JUSTINIAN, bk. 2, 65 (J. Thomas trans. 1975)); see also Kehoe, *supra* at note 4, at 1918 (quoting Roman law as declaring that “[n]o one therefore is forbidden access to the seashore”).

21. Langella, *supra* note 20, at 182.

Under English common law, the Public Trust Doctrine evolved to mean that certain land was not simply common property, but that the title was held by the king or sovereign in trust for the benefit of the public.<sup>22</sup> This concept of the Public Trust was later adopted in colonial America as part of the English common law and continued to develop in American case law.<sup>23</sup> Though greatly varying in its application throughout the states, the Public Trust Doctrine has been adopted, in some form, by nearly every state.<sup>24</sup>

While the concepts underlying the Public Trust Doctrine date back to the earliest days of colonial America, it was not until 1892 that the United States Supreme Court fully enunciated the concept of the Public Trust.<sup>25</sup> In the landmark case of *Illinois Central Railroad v. Illinois*, the Court echoed the Public Trust Doctrine's English common law roots when it ruled that public trust lands "were held by the [s]tate, as they were by the king, *in trust* for the public uses."<sup>26</sup> These "public uses," the Court said, are "always paramount."<sup>27</sup> Nevertheless, the Court left it to the individual states to determine the development and implementation of the Public Trust Doctrine.<sup>28</sup>

The Public Trust Doctrine states that lands underneath coastal waters up to the mean high tide mark are held by the state in trust for the people.<sup>29</sup> The Supreme Court, in *Phillips Petroleum Co. v. Mississippi*,<sup>30</sup>

---

22. *Id.* (making the distinction between the two types of title in the English common law that are the basis of the Public Trust Doctrine: *jus privatum*, the lesser title held by the king, which concerns the right of the king to alienate the trust lands subject to the rights of the public; and *jus publicum*, the dominant title held by the public, which concerns the right to use the land for navigation, commerce, and fishing).

23. *Id.* at 183; see also Donald D. Cooper, *In Recreation We Trust: The Public Trust Doctrine After Fafard*, 45 BOSTON B. J. Sept./Oct. 2001, at 8, 23-24 (discussing the development of the Public Trust Doctrine in Massachusetts from colonial times through the present day).

24. Langella, *supra* note 20, at 183. Aside from the difference from state to state, the United States's federal system requires that the federal government's interest focus on interstate commerce in navigable waters while each state's interest centers on navigable waters within the state. *Id.*

25. Kehoe, *supra* note 4, at 1925. The case in question, *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892), arose when the state of Illinois granted a large portion of the Chicago waterfront along Lake Michigan to the railroad company as a private owner. *Id.* at 433-34. In response, the Attorney General of Illinois, on behalf of Illinois citizens, challenged the railroad's rightful ownership of the property. *Id.* at 433.

26. *Ill. Cent. R.R.*, 146 U.S. at 457. The opinion went on to state that "[b]eing subject to this trust, [the lands] were *publici juris*; in other words, they were held for the use of the people at large." *Id.*

27. *Id.* at 457.

28. Langella, *supra* note 20, at 185.

29. *Ill. Cent. R.R.*, 146 U.S. at 435; see also Egan, *supra* note 6.

30. 484 U.S. 469 (1988).

held that these lands were given to each state when it entered the Union.<sup>31</sup> The Court also considered alternative means for delineating the boundaries of public trust lands, but determined that “the ebb-and-flow rule ha[d] the benefit of ‘uniformity and certainty, and . . . eas[e] of application.’”<sup>32</sup>

However, uniformity, certainty, and ease of application have not always been the norm. Complicated issues have arisen regarding where to draw the line between public and private lands, a question that *Illinois Central Railroad* left to the states to decide.<sup>33</sup> Some states draw the line granting beachgoers more “dry sand” area (the area above the high tide mark) for recreation, while other states draw the line much closer to the low tide mark.<sup>34</sup> With New Jersey leading the way, many states have added the idea that actual access to the beach must be granted.<sup>35</sup>

## 2. New Jersey: Using the Public Trust Doctrine to Its Fullest

Depending on the state, access to public trust coastal lands is provided for in different ways, or not provided for at all.<sup>36</sup> New Jersey courts have

---

31. *Id.* at 481; see also *Ill. Cent. R.R.*, 146 U.S. at 457 (stating that “prior to the Revolution, the shore and lands under water of the navigable streams and waters of the province of New Jersey belonged to the King of Great Britain as part of the *jura regalia* of the crown, and devolved to the State by right of conquest”).

32. *Phillips Petroleum*, 484 U.S. at 481 (citing *Cobb v. Davenport*, 32 N.J.L. 369, 379 (1867)). In addition, the Court admonished that the expectations of property owners must be honored only where they are reasonable. *Id.* at 482. Because Mississippi had so frequently asserted its public trust interest in the state’s tidelands, the Court stated that “[a]ny contrary expectations cannot be considered reasonable.” *Id.*

33. Cox, *supra* note 13 (commenting that in *Illinois Central Railroad*, the Supreme Court “established that beaches belong to the citizenry under the public trust doctrine but left it to states to draw the lines”).

34. *Id.*; see also Kehoe, *supra* note 4, at 1916 (“Generally, the mean high tide line is the line of demarcation between private and state ownership. Delaware, Maine, Massachusetts, New Hampshire, and Virginia have historically used the low water mark as the line of demarcation, a line more favorable to private landowners.”) (footnotes omitted).

35. Cox, *supra* note 13. California is another leader in providing for beach access. *Id.* (commenting that California’s leadership on the issue of access was so strong that “unimpeded beach access became known, along with mayonnaise on hamburgers, as a West Coast cultural phenomenon”).

36. See Kehoe, *supra* note 4, at 1915-16; see also Alice Gibbon Carmichael, Comment, *Sunbathers Versus Property Owners: Public Access to North Carolina Beaches*, 64 N.C. L. REV. 159, 191 (1985) (noting that “[a]t least six jurisdictions have enacted legislation designed to secure a public right of beach access”). In addition to California, Texas and Hawaii have provided for or encourage access routes via statute. Kehoe, *supra* note 4, at 1915. New Jersey, as discussed *infra*, has done so primarily through judicial decision. Other states, such as Delaware, Maine, Massachusetts, New Hampshire, and Virginia, have adopted more stringent guidelines when it comes to public

been both pioneers and leaders in their application of the Public Trust Doctrine, being among the first to both discuss the concept and to expand its usage.<sup>37</sup> In the 1821 case of *Arnold v. Mundy*,<sup>38</sup> the New Jersey Supreme Court stated that “where the tide ebbs and flows, the ports, the bays, the coasts of the sea, including both the water and the land under the water . . . are common to all the people, and that each has a right to use them according to his pleasure.”<sup>39</sup> For many years after this first enunciation of the Public Trust Doctrine, however, the public’s rights under it slowly eroded.<sup>40</sup> It was not until the early 1970s that the New Jersey courts began to reassert themselves in order to restore the Public Trust Doctrine and expand its scope.<sup>41</sup>

New Jersey’s first great expansion of the Public Trust Doctrine came in 1972 when the New Jersey Supreme Court decided *Borough of Neptune City v. Borough of Avon-by-the-Sea*.<sup>42</sup> In *Avon*, the court expanded the Public Trust Doctrine to include dry upland shore areas in addition to those under “where the tide ebbs and flows.”<sup>43</sup> The court said that the Public Trust Doctrine was “not limited to the ancient prerogatives of navigation and fishing, but extend[ed] as well to recreational uses, including bathing, swimming and other shore activities.”<sup>44</sup>

In addition to allowing the Public Trust Doctrine to cover dry sand areas, the court also held that public trust lands were inalienable.<sup>45</sup> Following *Arnold*, New Jersey courts had repeatedly held that the legislature’s power to convey trust lands to private parties was unlimited.<sup>46</sup> The *Avon* court, however, explicitly stated that “control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can

---

property ownership and have rejected efforts to expand public rights to the states’ beaches. *Id.* at 1915-16.

37. See Langella, *supra* note 20, at 198. New Jersey has over 123 miles of coastline and is “generally regarded as the first state to have judicially recognized the scope and applicability of the Public Trust Doctrine.” *Id.* at 202.

38. 6 N.J.L. 1 (1821).

39. *Id.* at 12.

40. Langella, *supra* note 20, at 199.

41. *Id.*

42. 294 A.2d 47 (N.J. 1972). This case decided whether an oceanfront community could charge non-residents higher fees for the use of its beaches than it did residents. *Id.* at 48. Rather than address the case from the argument that the disparity in fees amounted to discrimination, the court applied the Public Trust Doctrine and expanded it to include upland dry sand areas. *Id.* at 51.

43. *Id.* at 50-51.

44. *Id.* at 54.

45. *Id.* at 53-54.

46. Langella, *supra* note 20, at 202.



be disposed of without any substantial impairment of the public interest in the lands and waters remaining.”<sup>47</sup>

This elucidation of the Public Trust Doctrine’s principles did not solve the problems arising from the legislature’s *prior* improper alienation of New Jersey’s coastal lands, namely the scarcity of beachfront property available for public use in the state.<sup>48</sup> Nor did the court attempt to address the possible solution of allowing public access across these now privately-held lands.<sup>49</sup> The court did recognize that an obligation to allow for such access may have been “impliedly impressed . . . on the grantee” due to the “public rights therein.”<sup>50</sup> Nevertheless, the court said that the case at hand did not require the determination of such issues and left its resolution for another day.<sup>51</sup>

That day came a decade later when the New Jersey Supreme Court decided *Matthews v. Bay Head Improvement Ass’n*.<sup>52</sup> In *Matthews*, the court included in its discussion not only the extent of public trust lands and the permissible uses thereof, but also the public’s ability to *access* public trust lands.<sup>53</sup> The court stated that “[t]oday, recognizing the increasing demand for our State’s beaches and the dynamic nature of the public trust doctrine, we find that the public must be given *both access to and use of* privately-owned dry sand areas as reasonably necessary.”<sup>54</sup> Thus, the *Matthews* case demonstrates the relevance of the Public Trust Doctrine, not just to areas where the land and sea meet and where the

---

47. *Avon*, 294 A.2d at 54; *see also* Langella, *supra* note 20, at 202 (commenting that “[i]n essence, the court’s holding in *Avon* salvaged from the depths, the Public Trust Doctrine’s principle of inalienability of trust lands”) (footnotes omitted).

48. Langella, *supra* note 20, at 202-03 (commenting that the court’s discussion was “little more than a lament over past improper legislative action to alienate trust lands. With no discussion whatsoever of the judiciary’s repeated acquiescence to or participation in such indiscretions, and with apparently little to offer in the way of a solution”) (footnotes omitted); *Avon*, 294 A.2d at 53 (lamenting that “[r]emaining tidal water resources still in the ownership of the State are becoming very scarce, demands upon them by reason of increased population, industrial development and their popularity for recreational uses and open space are much heavier, and their importance to the public welfare has become much more apparent”).

49. *Avon*, 294 A.2d at 54; *see also* Langella, *supra* note 20, at 203 (commenting that such issues were “left to sink back into the dark and murky depths”).

50. *Avon*, 294 A.2d at 54.

51. *Id.*

52. 471 A.2d 355 (N.J. 1984). Previous New Jersey cases, including *Avon*, dealt only with the public’s right to use the dry sand areas of municipally owned beaches. Finnell, *supra* note 16, at 642. *Matthews*, on the other hand, addressed the public’s similar interests in privately owned beaches. *Id.*

53. *Matthews*, 471 A.2d at 358. The court set forth the issue as “whether, ancillary to the public’s right to enjoy the tidal lands, the public has a right to gain access through and to use the dry sand area not owned by a municipality but by a quasi-public body.” *Id.*

54. *Id.* at 365 (emphasis added).

tides flow, but to the adjacent private property that is specifically necessary for access.<sup>55</sup>

### B. Regulatory Takings

#### 1. Foundation: Justice Holmes and the Mystery of Mahon

In recent years, the Supreme Court has focused its takings jurisprudence on what types of governmental action constitute a taking, even when the full use of one's property has not been infringed.<sup>56</sup> These controversies have arisen most often in instances of zoning and land use regulation.<sup>57</sup> Before 1986, in its nearly 200 years of deciding cases, the Supreme Court found only four instances in which a law or regulation amounted to a "regulatory taking."<sup>58</sup> Then, in the first ten years of William H. Rehnquist's tenure as Chief Justice, the Court found four more.<sup>59</sup> "Regulatory takings" jurisprudence, however, is grounded in Justice Holmes' 1922 opinion in the case of *Pennsylvania Coal Co. v. Mahon*.<sup>60</sup>

In *Mahon*, Justice Holmes, writing for the majority, stated that "if regulation goes too far it will be recognized as a taking."<sup>61</sup> Although the

---

55. Finnell, *supra* note 16, at 644-45.

56. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 615-16 (2001); see also *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 314, 320-21 (2002).

57. See *Palazzolo*, 533 U.S. at 615-16; see also *Tahoe-Sierra*, 535 U.S. at 320-21. *Id.* Both of these cases, but especially *Tahoe-Sierra*, were considered setbacks for property rights advocates and marked a departure from the Court's tendency to find takings where government restrictions limited the use of one's land. See Linda Greenhouse, *Justices Weaken Movement Backing Property Rights*, N.Y. TIMES, Apr. 24, 2001, at A1.

58. Robert Brauneis, "The Foundation of Our 'Regulatory Takings' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in *Pennsylvania Coal Co. v. Mahon*, 106 YALE L.J. 613, 615 (1996).

59. *Id.* These four are *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (discussed *infra*), *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (discussed *infra*), *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987) (discussed *infra*), and *Hodel v. Irving*, 481 U.S. 704 (1987).

60. 260 U.S. 393 (1922). This case involved a deed transfer where the property owner sold the surface rights but expressly retained the right to remove the subsurface coal. *Id.* at 412. A Pennsylvania statute, the Kohler Act, prohibited the mining of any coal that would lead to the subsidence of any house built upon the land, unless the house was owned by the owner of the underlying coal. *Id.* at 412-13. As a result of the Act, coal removal was impossible, thus eviscerating the value of the owner's retained removal rights. *Id.* at 413. The Court held that this diminution in the owner's coal removal rights amounted to a taking worthy of just compensation. *Id.* at 414-15.

61. *Id.* at 415. Exactly what Justice Holmes meant by "too far" has been the subject of much discussion and deliberation. See, e.g., Brauneis, *supra* note 58, at 617; Danaya C. Wright, *Eminent Domain, Exactions, and Railbanking: Can Recreational Trails Survive the Court's Fifth Amendment Takings Jurisprudence?*, 26 COLUM. J. ENVTL. L. 399, 416 (2001).

challenged regulation in *Mahon* was arguably for the public good, Justice Holmes warned against the “danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.”<sup>62</sup> In short, “just compensation” is necessary.<sup>63</sup>

Justice Holmes’ opinion in *Mahon* has been called “both the most important and most mysterious writing in takings law.”<sup>64</sup> Indeed, Chief Justice Rehnquist has concluded that *Mahon* is “the foundation of our ‘regulatory takings’ jurisprudence.”<sup>65</sup> Given the high regard in which the Chief Justice and several of his Associate Justices hold this opinion, along with the Rehnquist Court’s tendency to find laws to be regulatory takings, one can appreciate why the opinion is fundamental to modern takings jurisprudence.<sup>66</sup> Nevertheless, as mentioned above, it remains something of an enigma.<sup>67</sup>

Much of the mystery and confusion revolves around what Justice Holmes meant when he referred to a regulation going “too far.”<sup>68</sup> Justice Scalia, while praising the originality of the opinion, noted this uncertainty when he stated that Justice Holmes “offered little insight into when, and under what circumstances, a given regulation would be seen as going ‘too

---

62. *Mahon*, 260 U.S. at 416.

63. U.S. CONST. amend V. It was common practice in the region for coal mining companies to pay compensation to the surface property owners for any subsidence caused by their mining. James E. Krier, *Takings From Freund to Fischel*, 84 GEO. L.J. 1895, 1897 (1996). This was the practice both before and after the enactment of the Kohler Act. *Id.* Indeed, even the *Mahon* decision had little impact on the mining companies’ activities. *Id.*

64. Brauneis, *supra* note 58, at 615 (quoting BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 156 (1977)).

65. *Id.* at 615-16 (quoting Keystone Bituminous Coal Ass’n v. DeBenedictus, 480 U.S. 470, 508 (1987) (Rehnquist, C.J., dissenting)).

66. See also *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992). In *Lucas*, Justice Scalia credited Justice Holmes with inventing the idea of regulatory takings, saying “if the protection against physical appropriations of private property was to be meaningfully enforced, the government’s power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits.” *Id.* But see *Dolan v. City of Tigard*, 512 U.S. 374, 406-07 (1994). Here, Justice Stevens recognized in dissent that “Justice Holmes charted a significant new course” but also noted that “[t]he so-called ‘regulatory takings’ doctrine that the Holmes dictum kindled” is a “potentially open-ended source[] of judicial power to invalidate state economic regulations that Members of this Court view as unwise or unfair.” *Id.* (Stevens, J., dissenting).

67. Brauneis, *supra* note 58, at 617. Professor Brauneis further notes that that “if *Mahon* is celebrated for its originality and fecundity, it is also blamed for the muddled state of regulatory takings doctrine.” *Id.*

68. *Penn. Coal Co. v. Mahon*, 260 U.S. at 393, 415 (1922) (“The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”).

far' for purposes of the Fifth Amendment."<sup>69</sup> Moreover, the opinion has been embraced both by those who view diminution in property value as the appropriate barometer for finding a regulatory taking, as well as those who endorse the use of a balancing test.<sup>70</sup> Neither test has managed to achieve a consensus among academics or within the Court itself.<sup>71</sup>

## 2. *Development: Revisiting (and Clarifying) Mahon*

More than fifty years after *Mahon*, the Court revisited the issue of regulatory takings in *Penn Central Transportation Co. v. New York City*.<sup>72</sup> The Court's opinion in *Penn Central* noted that *Mahon* stood for the notion "that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.'"<sup>73</sup> The Court concluded that the "too far" language required "essentially ad hoc, factual inquiries."<sup>74</sup> Justice

---

69. *Lucas*, 505 U.S. at 1015. During his Supreme Court confirmation, then-Judge Breyer also noted this confusion:

When does a reasonable regulation become a taking of property for which you must pay compensation? You know what Justice Holmes said. You are going to be disappointed, but what he said was this. He said, 'You don't have to compensate, when you regulate. But, Government, you cannot go too far.' What is too far? Indeed, ever since that time, the courts have been trying to work out what is too far, and I don't think anyone has gotten a perfect measure of that.

Brauneis, *supra* note 58, at 618 n.20 (quoting *Nomination of Stephen G. Breyer to be an Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 103d Cong. 110, 111 (1994) (testimony of Judge Breyer)).

70. Brauneis, *supra* note 58, at 616-17.

71. *Id.* ("Academic [acknowledgment] of a balancing test in *Mahon* runs a close second to acknowledgment of a diminution in value test.") (footnote omitted).

72. In the fifty years since *Mahon*, the Court had "heard no land-use cases of substance, [and] state courts whittled away much of the decision's chilling effect on land-use regulation." David L. Callies, *Takings Clause—Take Three*, A.B.A. J., Nov. 1, 1987, at 48. "[B]eginning in 1978 [with *Penn Central*] the Court accepted a series of cases addressing the key issues raised in [*Mahon*]: (1) When has a regulation gone 'too far'? and (2) Is compensation an appropriate remedy, once the 'too far' has been reached?" *Id.*

The issue in *Penn Central* was "whether a city may, as part of a comprehensive program to preserve historic landmarks and historic districts, place restrictions on the development of individual historic landmarks . . . without effecting a 'taking' requiring the payment of 'just compensation.'" *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 107 (1978). Specifically, the case decided whether New York City could block the owners of the parcel of land upon which Grand Central Terminal was built from erecting a much larger building on the terminal's roof. *Id.* at 116.

73. *Penn Central*, 438 U.S. at 127. The Court noted that in *Mahon*, because the statute rendered coal mining "commercially impracticable," it effectively destroyed the owner's rights to the underlying coal. *Id.* Accordingly, "the statute was invalid as effecting a 'taking' without just compensation." *Id.* at 127-28 (internal citations omitted).

74. *Id.* at 124.

Brennan's majority opinion outlined a three-factor test to use in making these ad hoc determinations: (1) the "economic impact of the regulation on the claimant;" (2) "the extent to which the regulation interfered with distinct investment-backed expectations;" and (3) "the character of the governmental action."<sup>75</sup> Essentially, the Court held that a fact-specific inquiry must be made as to the circumstances surrounding each regulation and its purported effect.<sup>76</sup>

Using this type of inquiry, the Court did not find a taking in *Penn Central*.<sup>77</sup> Rather, it said that because the "restrictions imposed [were] substantially related to the promotion of the general welfare" (see factor 3 above) and permitted "reasonable beneficial use" of the property (see factor 1 above), the regulations did not suggest such a finding.<sup>78</sup> However, the Court did add something new to the conventional regulatory takings tests and jurisprudence: consideration of the property owner's "distinct investment backed expectations."<sup>79</sup>

### 3. *The Rehnquist Court: The Pendulum Swings*

#### a. *The "Essential Nexus" Requirement: Nollan v. California Coastal Commission*<sup>80</sup>

*Nollan* concerned a regulation imposed by the California Coastal Commission requiring any beachfront home owner seeking to replace an existing single family home to grant a public access easement across his property.<sup>81</sup> The Nollans had a small bungalow on their oceanfront lot and wanted to replace it with a larger one but balked at granting a public easement.<sup>82</sup> They brought suit in County Superior Court, which struck down the condition, only to have the condition reimposed by the

---

75. *Id.*

76. *Id.* ("[T]his Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government."). *Id.*

77. *Id.* at 138 (holding that "[o]n this record, we conclude that the application of New York City's Landmarks Law has not effected a 'taking' of appellants' property").

78. *Id.* In dissent, then-Justice Rehnquist signalled the direction that he would take the Court as Chief Justice. He remarked that the City of New York had "destroyed--in a literal sense, 'taken'--substantial property rights of *Penn Central*." *Id.* at 143 (Rehnquist, J., dissenting).

79. *Id.* at 127; see also JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 1165 (4th ed. 1998) (discussing how this new concept has been interpreted).

80. 483 U.S. 825 (1987).

81. *Id.* at 827-29.

82. *Id.*

California Court of Appeals.<sup>83</sup> The United States Supreme Court ultimately reversed the decision of the Court of Appeals.<sup>84</sup>

The majority of the Supreme Court held that the government could validly condition a development permit on the granting of an access easement only where the easement was reasonably related to mitigating the harmful effects of the proposed development.<sup>85</sup> The Court found that the Commission's conditions on the Nollans' development lacked this "essential nexus" and were, therefore, invalid.<sup>86</sup> The Court held the easements constituted a "permanent physical occupation" and thus constituted a taking under the Fifth Amendment.<sup>87</sup> The Court noted that if the State wanted to obtain such easements, it must do so through use of its eminent domain power.<sup>88</sup>

*Nollan* severely limited California's attempt to obtain beach access easements throughout the state.<sup>89</sup> In California, public beach access is guaranteed in its constitution<sup>90</sup> and provided for by statute.<sup>91</sup> Legally, there is no such thing as a private beach anywhere along the 1,160 miles of California coastline.<sup>92</sup> However, the statute's main component had been the requirement that property owners grant beach access easements

---

83. *Id.* at 829-30.

84. *Id.* at 841-42.

85. *Id.* at 836-37 (stating "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion'" (citing *J.E.D. Associates, Inc. v. Atkinson*, 432 A.2d 12, 14-15 (1981))).

86. *Id.* at 837 (equating the Commission's scheme to a law forbidding "shouting fire in a crowded theater, but grant[ing] dispensations to those willing to contribute \$100 to the state treasury").

87. *Id.* at 831-32, 841-42. The case turned on whether the permit condition (*i.e.*, the mandated easement) served the same governmental purpose as the building restriction. *Id.* at 836-37. The Court deemed that it did not and that conditioning one on the other was not a valid use of the police power and, hence, a violation. *Id.* at 837.

88. *Id.* at 832.

89. Egan, *supra* note 6. Many property owners think that the limitations enunciated by *Nollan* should apply retroactively to the easements they granted in the early 1980s. *Id.* Their argument is that the easements were essentially "extorted" from the property owners as a condition for improving upon or expanding their properties. *Id.*

90. CAL. CONST. art. X, § 4 (explicitly stating that no one possessing property that fronts on any "navigable water" in the state of California may "exclude the right of way to such water whenever it is required for any public purpose").

91. CAL. PUB. RES. CODE § 30211 (West 2001) ("California Coastal Act") (mandating that "development shall not interfere with the public's right of access to the sea").

92. Egan, *supra* note 6. Compare this to Maine, which has only twenty miles of publicly owned coastline out of a total of 3800 miles, or Massachusetts, where only 300 out of a total of 1500 miles of shoreline is available for public use. Kehoe, *supra* note 4, at 1916, n.15.

across their property in exchange for development permits.<sup>93</sup> This component was restricted in *Nollan*.

*Nollan* implicates the Public Trust Doctrine as it impacted California's plan to provide access to public trust lands, but the extent of those implications is debatable.<sup>94</sup> In fact, the majority in *Nollan* did not make any reference to the Public Trust Doctrine in its decision, likely because neither party argued it.<sup>95</sup> Because *Nollan* concerned a statutory regulation of lands not traditionally considered part of the Public Trust, the case was treated as a takings dispute, not a Public Trust dispute.<sup>96</sup> Takings disputes involving lands lying adjacent to public trust lands, such as beachfront private property that blocks public beach access, necessarily implicate the Public Trust Doctrine.<sup>97</sup>

*b. Taking as "Total Deprivation": Lucas v. South Carolina Coastal Council*<sup>98</sup>

In 1986, David Lucas purchased two beachfront lots on the coast of South Carolina.<sup>99</sup> He intended to build one single-family home on each parcel, one for his family and one for resale.<sup>100</sup> His plans were thwarted when, in 1988, the South Carolina legislature passed the Beachfront

---

93. See Doherty, *supra* note 10.

94. Finnell, *supra* note 16, at 633.

95. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 833 (1987). The majority observed that the Commission did not advance a Public Trust Doctrine argument based on Art. X, §4 of the California Constitution in the Court of Appeals, and "the Nollans argued in the Superior Court that any claim that there was a pre-existing public right of access had to be asserted through a quiet title action, which the Commission, possessing no claim to the easement itself, probably would not have had standing under California law to bring." *Id.* (citation omitted) This Note will discuss the concept of pre-existing public rights *infra* at Part III.B.1.

96. See Finnell, *supra* note 16, at 664-65. Professor Finnell suggests that "*Nollan* can be classified as a physical invasion case," and that the "Court closely examined the facts because of the physical invasion of the Nollans' land, then found a taking because the nexus between the burden on the Nollans and the governmental end was inadequate." *Id.* at 665. Finnell posits that, alternatively, *Nollan* "constitutes a new category of takings cases in which the Court first considers the nexus question and, if the connection is insufficient, declares a taking without engaging in a multifactored balancing process," which would require analysis under the Public Trust Doctrine. *Id.* at 665-66.

97. See *id.*; see also *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972) (stating "[l]ands adjacent to or near navigable waters exist in a special relationship to the state . . . and are subject to the state public trust powers").

98. 505 U.S. 1003 (1992).

99. *Id.* at 1006-07.

100. Hope M. Babcock, *Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence?: The Impact of Lucas v. South Carolina Coastal Council on Wetlands and Coastal Barrier Beaches*, 19 HARV. ENVTL. L. REV. 1, 12 (1995).

Management Act,<sup>101</sup> which prohibited development seaward of a setback line.<sup>102</sup> Because Lucas's lots were largely seaward of this line, he challenged the Act's constitutionality, alleging that it robbed him of all economically beneficial use of his property and, thus, amounted to a taking under the Fifth and Fourteenth Amendments.<sup>103</sup> The state trial court ruled in Lucas's favor and awarded him over \$1.2 million in "just compensation."<sup>104</sup> The State Supreme Court subsequently overturned the award, Lucas appealed, and the United States Supreme Court granted *certiorari*.<sup>105</sup>

Writing for the majority in *Lucas*, Justice Scalia stated that the *Penn Central* test should not be used in a *total* regulatory taking case, such as this, but only when a court is asked to determine if there has been a *partial* regulatory taking.<sup>106</sup> When determining if a *total* regulatory taking has occurred, the proper inquiry according to the Court is whether the "regulation denies all economically beneficial or productive use of land."<sup>107</sup> The Court stated that a "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation."<sup>108</sup> In such cases, it was not necessary to go into the "ad hoc" test described in *Penn Central* and engage in the "case-specific inquiry into the public interest advanced in support of the restraint."<sup>109</sup>

101. S.C. CODE ANN. § 48-39-290 (West Supp. 2002) (providing that "[n]o new construction or reconstruction is allowed seaward of the baseline except: (1) wooden walkways . . . (2) small wooden decks . . . (3) fishing piers which are open to the public . . . (4) golf courses . . . (5) normal landscaping . . . (6) structures specifically permitted by special permit[, and] . . . (7) pools may be reconstructed if they are landward of an existing, functional erosion control structure or device").

102. Babcock, *supra* note 100. This "setback line" was established by the South Carolina Coastal Council by connecting the landward-most points of erosion during the prior forty years. *Id.* at 12 n.56. The baseline established on the island on which Lucas's property was located "effectively blocked him from developing his land." *Id.*

103. *Lucas*, 505 U.S. at 1006-07; Babcock, *supra* note 100, at 12-13.

104. *Lucas*, 505 U.S. at 1009. The exact award was \$1,232,387.50. *Id.* Lucas had purchased the lots for \$975,000. *Id.* at 1006.

105. *Lucas v. S.C. Coastal Council*, 502 U.S. 966 (1991), *rev'd*, 505 U.S. 1003 (1992). Lucas conceded that the Beachfront Management Act was a legitimate effort on the part of the state to preserve South Carolina's beaches. *Lucas*, 505 U.S. at 1009-10. He had long been involved in the development of Isle de Palms, the barrier beach on which his lots were located, and was well aware of the fluctuations in the shoreline due to erosion. John R. Nolon, *High Court's 'Lucas' Decision Leaves Shifting Sands in Regulatory Takings Law*, N.Y.L.J., July 8, 1992, at 1. He argued that because the Act denied him all economically viable use of his property, he deserved to be compensated. *Id.*

106. *Lucas*, 505 U.S. at 1014-19.

107. *Id.* at 1015, 1017-18.

108. *Id.* at 1017.

109. *Id.* at 1015.



Although *Lucas* is a very important decision in the annals of regulatory takings jurisprudence, it provides guidance only when there has been a total regulatory taking.<sup>110</sup> Because of the opinion's arguably narrow scope, at its announcement, many observers were divided over what it actually meant and what its implications were for future disputes.<sup>111</sup> Even as property rights advocates welcomed another favorable ruling from the Rehnquist Court, many were dissatisfied that the opinion did not do more to clarify the law on partial takings, which have been considerably more common than total takings.<sup>112</sup>

Moreover, the Court left an opening for regulators in its discussion of "background principles of the [s]tate's law."<sup>113</sup> The only way a state can defend against a total taking without compensation is to show that, due to some "background principle" in the state's laws, the property interest supposedly "taken" was not originally part of the property owner's title.<sup>114</sup> The Court noted in dicta that it "assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title."<sup>115</sup>

---

110. Daniel Summerlin, Note, *Improving Public Access to Coastal Beaches: The Effect of Statutory Management and the Public Trust Doctrine*, 20 WM. & MARY ENVTL. L. & POL'Y REV. 425, 435 (stating that *Lucas* "offered no guidance as to what happens when there is only a partial taking").

111. See Dwight Merriam, *Lucas: Has Takings Law Been Set Adrift Once More?*, CONN. L. TRIB., July 13, 1992, at 20 (noting that "the [Amicus Curiae Committee of the American Planning Ass'n] seems quite divided on what *Lucas* means" with himself standing "at one extreme, believing that *Lucas* is very narrow decision on both the facts and the laws" and his colleague, Professor Norman Williams, Jr., standing at the other extreme, believing "that the *Lucas* decision reflects yet another step in Chief Justice William Rehnquist's 'conspiracy' to shift the Court to greater protection for private property rights").

112. Daniel J. Popeo & Paul D. Kamenar, *In Lucas's Wake, Whither the Law of Takings?: The Tide Has Finally Turned in Favor of Property Rights*, N.J.L.J., Aug. 3, 1992, at 15 (noting that "many property-rights advocates remain disappointed and dissatisfied even with this victory").

113. *Lucas*, 505 U.S. at 1029.

114. Daniel A. Nussbaum, Note, *McQueen v. South Carolina Coastal Council: Presenting the Question of the Relevance of the Public Trust Doctrine to the Total Regulatory Takings Analysis*, 53 S.C. L. REV. 509, 512 (2002); see *Lucas*, 505 U.S. at 1027 (noting that "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with" (footnote omitted)).

115. *Lucas*, 505 U.S. at 1028-29.

*c. Clarifying Nollan and Lucas: Dolan v. City of Tigard*<sup>116</sup> and  
*Palazzolo v. Rhode Island*<sup>117</sup>

The Supreme Court heard arguments in *Dolan* two years after *Lucas* and, in its opinion, further refined the test it had previously laid out in *Nollan*.<sup>118</sup> *Dolan* involved a situation similar to *Nollan* in which a development permit was conditioned upon the property owner granting a public easement.<sup>119</sup> Applying the *Nollan* “essential nexus” test, the Court found the necessary connection between the public purposes sought to be furthered, the prevention of flooding and the reduction of traffic congestion, and the requirement on the property owner to dedicate a portion of her property for a storm drainage system and bicycle path.<sup>120</sup> The Court then went one step further and required a showing that there be a “rough proportionality” between the requirement and the harm posed.<sup>121</sup> This increased the burden on states attempting to require easements across private property.<sup>122</sup>

In *Palazzolo*, a landowner sued over a denial of his request for permission to fill in the wetlands portion of his property in order to develop it.<sup>123</sup> He argued that denying him a permit to use his property in

---

116. 512 U.S. 374 (1994).

117. 533 U.S. 606 (2001).

118. Summerlin, *supra* note 110, at 435.

119. *Dolan*, 512 U.S. at 379-80. Florence Dolan owned a plumbing and electric supply store on a 1.67 acre site that included a gravel parking lot. *Id.* at 379. She applied for a permit to redevelop the site by nearly doubling the size of her store and paving the parking lot. *Id.* The City Planning Commission approved her proposed plans on the condition that she dedicate a portion of the property for improvement of a storm drainage system and placement of a 15-foot strip for a pedestrian or bicycle pathway. *Id.* at 379-80. These requirements were applied because the property was located within the 100-year floodplain of a nearby creek. *Id.* The dedicated area would amount to approximately ten percent of her total property. *Id.* at 380.

120. *Id.* at 386-87.

121. *Id.* at 391 (stating that “[w]e think a term such as ‘rough proportionality’ best encapsulates what we hold to be the requirement of the Fifth Amendment”).

122. Summerlin, *supra* note 110, at 436. Along with *Nollan* and *Lucas*, *Dolan* “show[ed] that the Supreme Court [was] adopting a pro-private property rights stance.” *Id.*; see also Danaya C. Wright, *Eminent Domain, Exactions, and Railbanking: Can Recreational Trails Survive the Court’s Fifth Amendment Takings Jurisprudence?*, 26 COLUM. J. ENVTL. L. 399, 419 (2001). The *Nollan/Dolan* test subjects governmental objectives and the means used to obtain those ends to a heightened level of scrutiny, threatening to replace the deferential minimum scrutiny traditionally given to facial challenges of regulations with a stricter takings test. *Id.*

123. *Palazzolo v. Rhode Island*, 533 U.S. 606, 611-16 (2001). Palazzolo’s plan was to carve the property up into seventy-four lots, a plan which “if realized, would have created a cottage development . . . within the reaches of the middle class.” Brian Bishop, *Whitehouse Loses War on Property Rights*, PROVIDENCE J.-BULLETIN, July 17, 2001, at 4B.

this way constituted a regulatory taking.<sup>124</sup> The Supreme Court found that the state regulation at issue effected only a partial regulatory taking because the landowner was not deprived of all beneficial use of his property; he could still develop the uplands portion.<sup>125</sup> The Court opted not to apply the reasoning of *Lucas* and it remanded the case for a partial regulatory takings analysis under *Penn Central*.<sup>126</sup>

*d. Turning the Tide on Property Rights and Regulatory Takings: Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*<sup>127</sup>

The landmark ruling that property rights advocates were hoping for in *Palazzolo* came later in *Tahoe-Sierra*.<sup>128</sup> Much to their chagrin, it was not a victory but a defeat, as *Tahoe-Sierra* upheld the right of the government to temporarily ban development of private property without having to compensate property owners.<sup>129</sup> The plaintiffs in *Tahoe-Sierra* were hundreds of people who had purchased plots of land along the shores of Lake Tahoe that later became subject to a temporary moratorium on development.<sup>130</sup> Relying on *Lucas*, the property owners argued that even a temporary restriction on the use of land that strips it of all “economically viable” use is a taking worthy of compensation.<sup>131</sup>

124. *Palazzolo*, 533 U.S. at 611.

125. *Id.* at 630-32. “[A] [s]tate may not evade the duty to compensate on the premise that the landowner is left with a token interest[, however,] . . . [a] regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property ‘economically idle.’” *Id.* at 631 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992)).

126. *Id.* at 630-32. So, after a “muddled ruling” the case went back to state court. Anthony Flint, *Landlocked on the Coast for 40 Years, Anthony Palazzolo Has Battled R.I. Over Property Rights, All the Way to the Supreme Court*, BOSTON GLOBE, Nov. 3, 2002, at B1 (describing Mr. Palazzolo’s frustration about the inability to build on his land, his resignation over returning to state court, and his disappointment that the Supreme Court did not issue a clearer ruling, making his a landmark case).

“I never got one penny off this land. All I got is tax bills,” he said on a recent walk through the property, gulls skimming over the shallow, salty water before him. “You think those guys fighting the Revolutionary War wanted us to have to ask the next person, ‘Can I do this with my land?’ [Expletive]. They were tough.”

*Id.* *Palazzolo*, now 82, acknowledges that the land will never be developed and wonders who, if anyone, will pay for it. *Id.*

127. 535 U.S. 302 (2002).

128. Flint, *supra* note 126 (commenting that *Palazzolo* was “a muddled ruling, eclipsed in significance a few months later by a case out of Lake Tahoe that more clearly sided with government’s right to control development”).

129. *Tahoe-Sierra*, 535 U.S. at 321, 341-42.

130. *Id.* at 311-12.

131. *Id.* at 316.

However, the Court limited *Lucas* to the “extraordinary circumstance” in which a government regulation “deprives a property owner of all economic use” and found that a temporary moratorium on development did not constitute such a deprivation.<sup>132</sup> Given the expanded protection granted property owners under *Nollan*, *Lucas*, and *Dolan*, *Tahoe-Sierra* is viewed as a setback for the property rights movement.<sup>133</sup> It marked a departure from the Court’s tendency to strictly uphold property rights and changed the way land use decisions would be made at all levels of government.<sup>134</sup>

### III. HOW THE PUBLIC TRUST DOCTRINE CAN ENABLE STATES TO PROVIDE FOR BEACH ACCESS

#### A. Distinguishing Lateral and Perpendicular Access

To some extent, nearly all states recognize the public’s right to the tidelands held under the Public Trust Doctrine.<sup>135</sup> Similarly, nearly all states allow the public to tread over and upon these lands as long as they do not encroach upon any adjacent private property.<sup>136</sup> This type of access is known as lateral access.<sup>137</sup>

Perpendicular access is another matter entirely, and the one that will be the concern of the remainder of this Note.<sup>138</sup> Perpendicular access refers to the public’s right to access the shoreline by crossing the private land of another.<sup>139</sup> While nearly all states recognize the public’s right to lateral access, California and New Jersey are among the few that have sought to enforce perpendicular access.<sup>140</sup>

---

132. *Id.* at 337, 341-42.

133. Linda Greenhouse, *Justices Weaken Movement Backing Property Rights*, N.Y. TIMES, Apr. 24, 2002, at A1 (stating that “[t]oday’s decision had the effect of limiting some of the [C]ourt’s recent property rights rulings and left property rights advocates scrambling to minimize the scope of their defeat, at least for public consumption”). It was also seen as a “stinging defeat to nearly 700 families who bought lots near Lake Tahoe in the late 1970s. They hoped to build vacation or retirement homes there but soon ran afoul of new environmental rules.” David G. Savage, *Landowners Dealt a Blow by Justices*, L.A. TIMES, Apr. 24, 2002, at A1.

134. See Savage, *supra* note 133. “The 6-3 ruling is an important victory for city planners, state officials and environmentalists nationwide. It reaffirms the broad authority of local and state officials to control development and regulate property.” *Id.*

135. See *supra* text accompanying note 24; see also Summerlin, *supra* note 110, at 425.

136. Summerlin, *supra* note 110, at 425.

137. *Id.*

138. *Id.* at 426.

139. *Id.*

140. See *supra* Section I (outlining efforts to provide for beach access easements in California); see also *supra* notes 36-55 and accompanying text (discussing the development of the Public Trust Doctrine in New Jersey); see also Summerlin, *supra* note 110, at 426

The lack of perpendicular access in most states has led to a scenario where beaches are purportedly open to and even owned by the public, but are completely inaccessible.<sup>141</sup> With increasing private development of the shoreline, this problem is likely to worsen in the coming years.<sup>142</sup> Therefore, state governments must be given the power to uphold their rights and responsibilities as trustees of these lands through providing greater opportunities for perpendicular access to beaches.<sup>143</sup> While some states have used such common law means as custom,<sup>144</sup> prescription,<sup>145</sup>

---

(noting that “[t]he nearly unanimous rule is that the public trust doctrine does not grant the public any right or privilege of perpendicular access by crossing over private land”).

141. Summerlin, *supra* note 110, at 426-27 (pointing out that absent reasonable access to the shore, the rights granted by the Public Trust Doctrine are effectively nonexistent); *see also* Langella, *supra* note 20, at 184 (noting that “this missing right [of perpendicular access] has resulted in the absurd situation of beaches open to the public but with no way for the public to reach them”).

142. Summerlin, *supra* note 110, at 425.

143. *See* Finnell, *supra* note 16, at 680 (highlighting the need “to establish and protect accessways to public property under all available common law theories”).

144. *See id.* at 637-40. For example, the Oregon Supreme Court has held that the public’s use of the dry sand areas of its beaches met all the requirements of custom and was therefore protected. *State ex rel. Thornton v. Hay*, 462 P.2d 671, 676-77 (Or. 1969). The requirements outlined by the court were that the usage be (1) “ancient;” (2) “exercised without interruption;” (3) “peaceable and free from dispute;” (4) reasonable; (5) certain; (6) “obligatory;” and (7) not “repugnant, or inconsistent, with other customs or with other law.” *Id.* at 677.

More recently, the Oregon Supreme Court applied the notion of custom, discussed in *Thornton*, to uphold the right of the public to access the dry sand areas of beaches. *Stevens v. City of Cannon Beach*, 854 P.2d 449, 456 (Or. 1993). The court said that when the owners of the beachfront property “took title to their land, they were on notice that exclusive use of the dry sand areas was not a part of the ‘bundle of rights’ that they acquired, because public use of dry sand areas ‘is so notorious that notice of the custom on the part of the person buying land along the shore must be presumed.’” *Id.* (quoting *Thornton*, 462 P.2d at 678).

Texas has also used the concept of custom to allow for public easements across private property for beach access. *Matcha v. Mattox*, 711 S.W.2d 95, 98 (Tex. Civ. App. 1979). In *Matcha*, the Texas Court of Civil Appeals affirmed the lower court’s decision, holding that the “public had acquired [an] easement and right of access and use” because of “a right retained by virtue of continuous right in the public since time immemorial.” *Id.* at 97. The court further upheld an injunction that prohibited the property owner from engaging in any activity that “restrain[ed] or interfer[ed] with the right of the public, individually or collectively, to free and unrestricted access to and use of the beach area.” *Id.* at 98. While the use of custom in this way has gained some favor in recent years, it is still not uniformly recognized by American courts. Finnell, *supra* note 16, at 644.

145. *See* Finnell, *supra* note 16, at 631-32. Most states recognize that continuous public use of a beach by the public can create a prescriptive easement. Langella, *supra* note 20, at 187. For example, the public’s right to access a Texas beach was upheld by prescription in the case of *Moody v. White*, 593 S.W.2d 372 (Tex. Civ. App. 1979). The court in *Moody* held that “[t]he general public . . . may acquire beaches by prescription if it can be established that the public has met all the requirements for adverse possession.” *Id.* at 378. However, it would be far more difficult for the general public to gain access to

and dedication<sup>146</sup> to find public access easements, this Note will show that the Public Trust Doctrine remains the most effective way to provide for beach access.<sup>147</sup>

*B. Reconciling Public Access Easements Under the Public Trust Doctrine With Regulatory Takings Jurisprudence*<sup>148</sup>

*1. Prior Existing Right of Use*

In *Phillips Petroleum Co. v. Mississippi*, the Court noted that there are no constitutional limitations on the right of the states to enforce pre-existing trust rights.<sup>149</sup> The Court reiterated this notion in *Lucas* when it noted that states need not compensate property owners for a complete regulatory taking when “the proscribed use interests were not part of [the property owner’s] title to begin with.”<sup>150</sup> Thus, a state’s exercise of its pre-existing right to provide access to the beachfront across a

---

a beach. See Langella, *supra* note 20, at 187 (recognizing the difficulties in obtaining prescriptive easements). Making the issue more difficult is the fact that “[p]ermissive use can defeat an alleged prescriptive easement in the public.” Finnell, *supra* note 16, at 632 (citing *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73 (Fla. 1974)).

146. See Finnell, *supra* note 16, at 633-37. A property owner may also expressly or implicitly dedicate lands to public use. *Id.* If the public accepts such a dedication, the transfer to the public is complete. *Id.* Dedication cases are troublesome, because it must be shown that the property owner intended to dedicate the land to the public. *Id.*; see, e.g., *Dept. of Natural Res. v. Mayor of Ocean City*, 332 A.2d 630, 635 (Md. 1975) (holding that a “clear and unequivocal manifestation” of the property owner’s intent was necessary before the court would find an implied dedication); see also *City of Palmetto v. Katsch*, 98 So. 352, 353 (Fla. 1923) (establishing the rule that “the intention of the owner to set apart the lands for the use of the public is the foundation and essence of every dedication”).

147. See Finnell, *supra* note 16, at 677 (“The public trust doctrine should become the theoretical foundation for assuring reasonable public access to coastal public property.”); see also Summerlin, *supra* note 110, at 437 (1996) (commenting that the Public Trust Doctrine is the least expensive means of resolving the beach access dilemma); Carmichael, *supra* note 36, at 201 (recommending expansion of the Public Trust Doctrine to include “recreational use of the dry-sand beach,” and noting that the “public trust doctrine is meaningless without access to the foreshore”).

148. Traditionally, the Public Trust Doctrine has shielded government from Fifth Amendment takings claims. Summerlin, *supra* note 110, at 429. The Public Trust Doctrine is grounded in property and trust law and has more to do with the property rights of the state vis a vis the public, and less to do with the police power of the state. *Id.* at 430. The government would not be found in violation of the Takings Clause so long as it was acting in its capacity as trustee of the land and had not breached its duty to the public. *Id.* The purpose of the Doctrine is “to ensure the public’s ability to fully enjoy the waters and lands held in trust” and the clear beneficiary of the trust is the public. *Id.* Therefore, “if the trust is to have any practical meaning, the public must possess the right to reach these areas.” *Id.* at 430.

149. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 483 (1988).

150. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992).

property-owner's land cannot accurately be considered to have "taken" anything from the property owner's "bundle of rights."<sup>151</sup>

In the context of *Nollan*, the majority observed that the Court has "repeatedly held that, as to property reserved by its owner for private use, the right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property."<sup>152</sup> This ignores the provision in the California Constitution that explicitly states that no one possessing property that fronts on "any navigable water" in the state may "exclude the right of way to such water whenever it is required for any public purpose."<sup>153</sup>

Thus, in California, the right to exclude is not included in the "bundle of rights" that property owners acquire when they obtain title to beach front property.<sup>154</sup> What one never had cannot be taken away.<sup>155</sup> Considering Justice Brennan's dissent in *Nollan*, in which he stated that "[t]he public's expectation of access considerably antedates any private development on the coast," the conclusion can be drawn that even absent a state constitutional provision for such, the public has a pre-existing right of access to the sea that is not abrogated by private development.<sup>156</sup>

## 2. The *Nollan* "Essential Nexus" Test

Arguably, the Court's ruling in *Nollan* is not nearly as broad as it might seem, and does not limit the states' ability to ensure access as much as it might appear.<sup>157</sup> The Court recognized that a "land-use regulation does not effect a taking if it substantially advances legitimate state interests and does not deny an owner economically viable use of his land."<sup>158</sup> In

---

151. *See id.*

152. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987) (internal quotations omitted).

153. CAL. CONST. art. X, § 4.

154. *See Lucas*, 505 U.S. at 1027 (noting that the Court's "takings jurisprudence . . . has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property").

155. *Id.* Before determining if a taking has occurred, the Court had to first *inquire "into the nature of the owner's estate"* in order to determine if the interests being taken were ever part of the owner's title in the first place. *Id.*

156. *Nollan*, 483 U.S. at 847 (Brennan, J., dissenting). Justice Brennan argues that the majority's opinion is "based on the assumption that private landowners in this case possess a reasonable expectation regarding the use of their land that the public has attempted to disrupt." *Id.* Justice Brennan concludes that "the situation is precisely the reverse: it is private landowners who are the interlopers." *Id.*

157. *See* Finnell, *supra* note 16 at 680.

158. *Nollan*, 483 U.S. at 834 (internal quotations omitted). The Court goes on to note that its "cases have not elaborated on the standards for determining what constitutes a legitimate state interest or what type of connection between the regulation and the state

*Nollan's* case, the Court merely found that there was no “nexus between the condition” (the required easement dedication) and “the original purpose of the building restriction” (providing *visual* access to the ocean).<sup>159</sup>

The Court further acknowledged that the condition on development would have been constitutional had it been related to the Public Trust Doctrine and people's right to access public lands, rather than an access easement, a “requirement that the [property owners] provide a viewing spot on their property for passersby.”<sup>160</sup> Such a requirement would “further the end advanced as the justification for the prohibition” and would not have been a taking but, rather “a legitimate exercise of the [state's] police power.”<sup>161</sup> As it turned out, the Commission did not assert a legitimate state interest in providing access to public trust lands and never mentioned the Public Trust Doctrine in its arguments in defense of the condition.<sup>162</sup> Thus, a piece of property's proximity to public trust lands and the state's unique responsibility to protect the public's right of access to such lands is a relevant consideration when determining whether a regulation amounts to a taking of such property.<sup>163</sup>

### 3. Penn Central and “Distinct Investment Backed Expectations”

One of the main propositions of *Lucas* is that the *Penn Central* test for partial regulatory takings should be applied unless the “regulation denies all economically beneficial or productive use of land.”<sup>164</sup> As the Court in *Palazzolo* elucidated, when a portion of the land can still be developed, a complete denial has not been effected.<sup>165</sup> Hence, when the matter is only

---

interest satisfies the requirement that the former substantially advance the latter.” *Id.* (internal quotations and footnote omitted).

159. *Id.* at 837.

160. *Id.* at 836.

161. *Id.* at 836-37.

162. *Id.* at 833. Only the California Attorney General would have had standing to assert the public's rights in the dispute and argue that the Public Trust Doctrine supports a public easement. Finnell, *supra* note 16, at 664.

163. Finnell, *supra* note 16, at 665.

164. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992). The Court determined that when “a regulation denies all economically beneficial or productive use of land,” it is appropriate to treat that regulation “as compensable without case-specific inquiry into the public interest advanced in support of the restraint.” *Id.*

165. *Palazzolo v. Rhode Island*, 533 U.S. 606, 630-32 (2001). The United States Supreme Court agreed with the Supreme Court of Rhode Island in its finding that “all economically beneficial use was not deprived because the uplands portion of the property can still be improved,” and that even under Rhode Island's wetlands protection regulations, the petitioner's parcel retained \$200,000 in development value. *Id.* at 630-31. This amount was not deemed to be the sort of “token interest” that would have required the state to provide compensation. *Id.*



a public access easement across one's property, the total taking requirement of *Lucas* as clarified in *Palazzolo* has not been met, and the *Penn Central* test for partial takings applies.<sup>166</sup>

Under *Penn Central*, for a court to find a partial regulatory taking, it must consider the economic impact upon the claimant along with the character of the governmental action, and the extent of interference with the property owner's "distinct investment-backed expectations."<sup>167</sup> Thus, the question to ask is whether it is reasonable for beachfront property owners to have the expectation that they will be able to exclude those seeking to cross their property for the purpose of reaching public trust lands.<sup>168</sup> Justice Brennan, who crafted the *Penn Central* test, suggests in *Nollan* that such an expectation is unreasonable.<sup>169</sup>

The reasonableness of a property owner's "investment-backed expectations" must be considered in light of the uniqueness of coastal lands and the public values associated with them.<sup>170</sup> Furthermore, a court must consider the extent to which the easement constitutes an invasion of the property, diminishes its value, and burdens the property owner.<sup>171</sup> If the landowner is minimally burdened in this way and his similarly situated neighbors are similarly burdened, a court should be more reluctant to find that the regulation effects a taking.<sup>172</sup> In any case,

166. See *id.* at 632. The easements being sought in California are nine feet wide. Kasindorf, *supra* note 3. At least one of the property owners fighting the proposed easements lives on an estate of twenty-five acres overlooking the Pacific Ocean. Egan, *supra* note 6.

167. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

168. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831-37 (1987).

169. *Id.* at 847 (Brennan, J., dissenting); see Babcock, *supra* note 100, at 66 n.354. (suggesting that "[d]etermining the reasonableness of a landowner's expectations about her property use rights . . . may be a matter of determining whether she had notice, at the time she acquired the property, of these common law doctrines as well as any changes in their scope"); see also Paul Sarahan, *Wetlands Protection Post-Lucas: Implications of the Public Trust Doctrine on Takings Analysis*, 13 VA. ENVTL. L.J. 537, 564 (1994) (suggesting that those who take property adjacent to public trust lands do so "with, at least, constructive knowledge of the state's interpretation of the public trust doctrine").

170. Finnell, *supra* note 16, at 679 (stating that "courts must carefully account for public values that are not included in the private owner's 'property' for purposes of the fifth amendment takings clause").

171. Other considerations must be taken into account. As Justice O'Connor stated in her concurrence in *Palazzolo*, "interference with investment-backed expectations is one of a number of factors that a court must examine" when considering partial regulatory takings. *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring).

172. *Id.*

Each person burdened by a harm-prevention regulation is also reciprocally benefited because similarly situated neighbors are also burdened. The lesson for coastal regulation is obvious: coastal landowners may be burdened by reasonable public access exactions; nevertheless, they are reciprocally benefited, both as individual landowners and as beneficiaries of the *jus publicum*.

whether or not the requirement of an access easement will amount to a taking requires deeper inquiry into the specific facts of each case.<sup>173</sup>

#### 4. Where Tahoe-Sierra Fits

*Tahoe-Sierra*, the Supreme Court's most recent addition to regulatory takings jurisprudence, reinforced some of the ideas illustrated above when it stated that "a regulation that affects only a portion of a parcel—whether limited by time, use, or space—does not deprive the owner of all economically beneficial use."<sup>174</sup> Furthermore, the Court noted that "restrictions on the use of only limited portions of the parcel" are "not considered regulatory takings."<sup>175</sup> Thus, an easement across a portion of property would be no more than a partial taking and, as such, subject to the *Penn Central* analysis.<sup>176</sup> Additionally, *Tahoe-Sierra* provided guidance to lower courts when applying this test and performing its "ad hoc, factual inquiries,"<sup>177</sup> reminding them that it is important to focus not on any individual factor, but rather on the entire parcel.<sup>178</sup>

### IV. CONCLUSION

The public's right of access to this nation's coastline is as old as the Republic itself.<sup>179</sup> With each passing year and the increase in coastal development that comes with it, the ability of the majority of Americans to access the nation's beaches grows more endangered.<sup>180</sup> If the Public

---

*Id.*

173. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123 (1978).

174. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 319 (2002). It is difficult to deny that a nine-foot wide beach access easement affects "only a portion of the parcel" and is "limited by time, use, or space." See *id.*; see *supra* note 168.

175. *Id.* at 326.

176. See *id.*; see also *Penn Cent. Transp. Co.*, 438 U.S. at 130-31 (noting that "[t]aking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with the rights of the parcel as a whole . . ." (cited in *Tahoe-Sierra*, 535 U.S. at 326).

177. *Tahoe-Sierra*, 535 U.S. at 326 (elaborating on the *Penn Central* analysis).

178. *Id.* This reinforced the determination made by the Court in *Palazzolo* that "a regulation permitting a landowner to build a substantial residence on an 18-acre parcel did not leave the property economically idle." *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001) (internal quotation omitted).

179. See Kehoe, *supra* note 4, at 1924 (noting that "after the American Revolution, the people became sovereign, thereby inheriting all rights in navigable waters and connected soils previously held by the Crown"); see also *supra* notes 23-35 and accompanying text (outlining the historical underpinnings of the Public Trust Doctrine in the United States).

180. See *supra* note 2 and accompanying text.

Trust Doctrine is to be anything more than a chimera, it must be used aggressively to provide for real, meaningful access to our nation's beaches.<sup>181</sup> Otherwise, these beaches will continue to become essentially private property and, in many instances, become yet another place where the haves will be able to exclude the have-nots.<sup>182</sup>

The Supreme Court has placed limits on the power of the states to enforce the Public Trust Doctrine, but those limits are far from insurmountable.<sup>183</sup> The public's right to the shore predates any right of private property owners to exclude them and, therefore, it is extremely important that the government protect that right in the face of takings claims.<sup>184</sup> The Public Trust Doctrine provides for the protection of this right and the state's duty as trustee demands that they stand guard over it.<sup>185</sup>

---

181. See *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355 (N.J. 1984), *cert. denied*, 469 U.S. 821 (1984), in which the New Jersey Supreme Court reasoned that [w]ithout some means of access the public right to use the foreshore would be meaningless. To say that the public trust doctrine entitles the public to swim in the ocean and to use the foreshore in connection therewith without assuring the public of a feasible access route would seriously impinge on, if not effectively eliminate, the rights of the public trust doctrine.

*Id.* at 364.

182. See *Kehoe*, *supra* note 4, at 1936 ("The more affluent sector of American society tends to dominate ownership of the beachfront property in the United States. When wealthy landowners can exclude others from obtaining access to the beaches, in effect, they own the beach, the foreshore, and the water directly in front of their property.").

183. As noted in Part III.B, *supra*, the holding in *Nollan* is not as restrictive as it seems at first glance, and *Tahoe-Sierra* reinforces the government's power to make restrictions on the use of property.

184. See *supra* Part III.B.1.

185. See *Kehoe*, *supra* note 4, at 1951 (arguing that if the states cannot fill this important responsibility, they should be removed as trustees).